

June 9, 2016

CERTIFIED MAIL  
RETURNED RECEIPT REQUESTED  
Reference Number: 16-0027

Ms. Ruby Dent  
Business Development Analyst  
Milwaukee County-CBDP  
2711W. Wells St.  
Room 830  
Milwaukee, WI 53208

Dear Ms. Dent:

Rams Contracting, LTD appeals the Wisconsin Uniform Certification Program's (WUCP)<sup>1</sup> determination that the firm is no longer eligible for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth at 49 C.F.R. Part 26 (the Regulation). After examining the entire administrative record, we conclude that the record is unclear regarding matters likely to have a significant impact on the outcome of the case. We therefore remand under Regulation §26.89(f)(4).<sup>2</sup>

WUCP issued its notice of intent to decertify the firm on December 19, 2014, and it conducted an informal hearing concerning the proposed decertification on May 5, 2015. The record, however, does not indicate that the hearing committee (the independent decisionmaker under §26.87(e)) issued a decision concerning the firm's eligibility, as 26.87(e) requires. The notice of decertification contains the same—verbatim— language that was stated within WUCP's proposed decertification letter, without reference to the committee's decision. It further appears that the certifier rather than the "decisionmaker" issued the decision.

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<sup>1</sup> The Milwaukee County Community Business Development Partners (MCCBDP) issued the firm's proposed and final decertification notices. MCCBDP is a member of the Wisconsin Uniform Certification Program (WUCP).

<sup>2</sup> §26.89(f)(4) provides:

"If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part."

When a DBE elects to respond in person to its proposed decertification, a recipient must ensure that it adheres to the separation of functions as detailed under 26.87(e). The provision requires that the certifier:

ensure(s) that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

In the 1999 preamble, the Department stressed that due process was one of the principal purposes in drafting this provision. *See* 64 FR 5096-01 (“separation of functions is essential: *there cannot be a fair proceeding if the same party acts as prosecutor and judge.*”) (Emphasis added). We cannot determine whether WUCP complied with the separation of powers provision.

The record, in this instance, contains an audio recording of the hearing and a decertification notice. Without an actual transcript, we cannot determine if the committee was comprised of independent decisionmakers.<sup>3</sup> In addition, as previously noted, it is unclear whether the committee actually made a decision after the informal hearing. The record before us suggests that the certifier acted as both the “prosecutor and judge” because it does not—likely due to an omission by the certifier—contain a written transcript or documented evidence of the committee decision. We are precluded from affirming a decision that is inconsistent with the procedural provisions of the Regulation and would result in fundamental unfairness or impede a DBE’s opportunity to adequately present its arguments on appeal.<sup>4</sup>

In summary, it is unclear whether the certifier followed proper due process in this case; we respectfully request that WUCP provide the firm with written notice of the *committee’s* determination *and the reasons* for it. *See generally*, §§26.86(a), 26.87(e), 26.87(f), 26.87(g). The firm, if it chooses, may file a new appeal to the Department that follows the requisite procedure set forth in Section 26.89 of the Regulation.

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<sup>3</sup> WUCP failed to produce a timely transcript of the May 5, 2015 hearing and a transcript of a previous hearing that is also required to create a *complete* administrative record. We remind WUCP that it is obliged under the regulation to produce a *written transcript* within 20 days of its notice of a firm’s decertification appeal. An audio recording is insufficient. Its failure to produce the transcript within the requisite period constitutes noncompliance under the Regulation. *See* §26.87(d)(2) (transcript requirement); *see also* §26.5 (“*Noncompliance* means that a recipient has not correctly implemented the requirements of this part”).

<sup>4</sup> We note that under 49 C.F.R. §26.89 (f)(3), “The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.” In this instance, however, we find that the potential procedural error would deprive Rams of its Regulatory due process right to an impartial hearing and affect the firm’s ability to put forth its best case on appeal.

*See generally*, 79 FR 59566-01 (“The purpose of the appeal is to provide the appellant an opportunity to point out to the Department, through facts in the record and/or arguments in the appeal letter, why the certifying agency’s decision is not “supported by substantial evidence or inconsistent with the substantive or procedural provisions of [Part 26] concerning certification.”)

We, therefore, direct that WUCP, not later than July 29, 2016, fully address the issues described above in a new, Regulation-compliant decision letter. If the UCP fails to act by such date, it will be considered in noncompliance. WUCP may hold a new hearing on the issues described in the notice of intent if it chooses to do so or if complying with the separation of functions provision requires it. We remind WUCP that, on appeal, it must, under §26.87(d)(2), promptly provide the Department a transcript of the hearing.

Sincerely,

Samuel F. Brooks  
DBE Appeal Team Lead  
External Civil Rights Programs Division

cc: Mr. Brown  
City of Madison  
WUCP  
FHWA